Id. at 169, citing to *Crawford-El,* 523 U.S.at 589. *Accord, Thomas v. Talley*, 251 F.3d 743, 746 (8th Cir. 2001). The First Circuit's decision in the instant case stands in conflict with the implicit holding of *Crawford-El*, and with the decisions in *Locurto*; *Thomas*, and *Myers v. Hasara,* 226 F.3d 821, 829 (7th Cir. 2000) (qualified immunity denied to officials acting in 1996, who disciplined a police officer whose protected conduct violated departmental rules), as well as those cited in the Petition at 20;

In their argument that the grant of qualified immunity was based on a finding of no material facts in dispute, (Resps.' Br. at 9), the Respondents misunderstand the issue raised in the Petition. The issue is whether the court applied an erroneous legal standard to the facts. (App. D at 34a); *Wagner v. City of Holyoke,* 241 F. Supp. 2d 78, 95 (D. Mass. 2003) As discussed above, in a case asserting retaliation for exercising First Amendment rights, a court must determine whether the individual defendants were acting with unconstitutional motive or intent. *See, Crawford-El*, 523 U.S. at 592; *Locurto*, 264 F.3d at 168-169. Only then does a court ask whether a reasonable official acting with that intent would know his actions were unconstitutional. *Id.* In the instant case, the trial court did not ask that question. Instead it only asked whether "reasonable officials in the defendants' positions at the time could objectively have believed, albeit mistakenly, that their conduct did not violate the First Amendment." (App. D at 34a); *Wagner,* 241 F. Supp. 2d at 95. The issue presented is whether the court applied an erroneous legal standard to the facts, not whether there were disputed facts.

The Court of Appeals repeated the trial court's error, by refusing to consider the individual defendants' motive or intent when reviewing the issue of qualified immunity. (App. A at 6a-7a). *Wagner v. City of Holyoke*, 404 F. 3d 504, 509

(1st Cir. 2005). Although initially stating the test established in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), that qualified immunity applies when the defendant's "conduct does not violate clearly established ... constitutional rights of which a reasonable person would have known," the court immediately revised that standard, making it more rigorous. It held that qualified immunity applies except where the defendants "must have known that [they were] acting unconstitutionally." *Wagner*, 404 F. 3d at 509. (App. A at 6a)

The Respondents' argument that the ruling on qualified immunity was harmless error since the jury found that "none of the individual defendants acted ... with improper motive," misstates the record. (Resps.' Br. at 10) Since those defendants were dismissed from the Civil Rights case on summary judgement, their motive, as individuals, was not an issue. The jury explicitly found that the defendant City retaliated against Sgt. Wagner for his protected speech. (Resps.' App. at 14) The individual defendants were the responsible City officials. Thus, their motive as officials, was established. Furthermore, the common law actions cited by the Respondents' had different elements and standards and cannot be analogized to the requisite intent for the Civil Rights claim. Finally, the issue of punitive damages was not litigated since the individual defendants had been dismissed, and such damages are not available against a municipality. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981). That issue is still open. Therefore, the court's erroneous ruling on qualified immunity was not harmless.

Sgt. Wagner asserts that this Court should grant the writ in order to establish the controlling standards for determining the availability of qualified immunity in cases in which the

constitutional tort involved requires proof of motive or intent as a necessary element of proof.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons stated above.

Respectfully submitted,

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